Portrait Of Bad Faith Bargaining



The Supreme Court of Canada (SCC) has now painted a very clear picture of its views on the duty to bargain in good faith. The SCC recently upheld a decision finding that a reversal of a longstanding bargaining position was a breach of that duty. The full text of the SCCs decision is here: Canadian Artists' Representation v. National Gallery of Canada, 2014 SCC 42. Our review of the decision follows.

Background

The Status of the Artists Act (the "*Artist Act*") governs professional relations between artists and federal government institutions that engage artists, including the National Gallery of Canada (the "Gallery"). Much like labour relations legislation, the *Artist Act* allows certification of associations to represent the interests of groups of artists, and to negotiate agreements – called "scale agreements" – with these federal institutions.

The Gallery started negotiating with two associations of visual artists (the "Associations") in 2003. The Associations wanted to include minimum fees for the use of existing works. The Gallery was initially hesitant, suggesting bargaining should be limited to fees for newly created works. However over the next four years, the Gallery negotiated fees for existing works, and included these fees in two draft agreements.

In 2007, after obtaining a legal opinion, the Gallery announced it would no longer discuss the fees. It presented a new draft agreement, removing all reference to these fees. The Associations filed a complaint claiming a failure to bargain in good faith.

The Duty to Bargain in Good Faith

Bargaining in good faith means that the parties must enter into "serious, open and rational discussions with the real intent of entering into a Collective Agreement. That obligation implies the parties act in a manner that is conductive to a full exchange of positions". Any action that prevents informed and rational discussion can be deemed an act of bad faith.

Presenting a proposal or taking a rigid stance which it should be known the other party could never accept generally constitutes a breach of the good faith requirement, as does a sudden unexplained change of position.

Tribunal and Federal Court Decisions

The Gallery argued that under the Artist Act, the parties were limited to negotiating terms and conditions for the "provision of artists' services and other related matters". It argued that assigning the right to use existing works was a matter of copyright outside the provision of services, which fell exclusively under the Copyright Act.

The Canadian Artists and Producers Professional Relations Tribunal (the "Tribunal") disagreed, and concluded that there was no language in the Artist Act that would prohibit negotiation of minimum fees for the right to use existing works. The Tribunal also found that the definition of "service or other related matters" was broad enough to include such fees. The Tribunal concluded that after four years of negotiating, the Gallery's sudden reversal and harsh stance was a violation of its duty to bargain in good faith.

The majority of the Federal Court of Appeal disagreed, finding that scale agreements could not impose minimum fees for existing works, because the Associations did not hold the copyright over these works – the individual artists did. Therefore, the fees must be dealt with under the *Copyright Act* and, on that basis, the Gallery did not breach its duty to bargain in good faith.

SCC Decision

Fees for existing works can be negotiated under the *Artist Act*, and the Gallery's reversal of position was a breach of its duty to bargain in good faith

The SCC decided that allowing use of a copyright for a fee was a "service", and agreed with the Tribunal's assessment that nothing in the *Artist Act* suggested new works should be treated differently from existing works. The purpose of the *Artist Act* is to compensate artists for their work and cannot be fulfilled if scale agreements cannot address existing works. This approach does not create a conflict with the *Copyright Act*.

The SCC noted that the Tribunal's reasons for finding the duty of good faith had been breached included:

- A reversal in position after four years of negotiating minimum fees for existing works;
- The reversal of this position created an impasse in bargaining;
- The Gallery ought to have known putting forward the revised scale agreement excluding minimum fees for existing works and taking such a rigid stance would be unacceptable to the Associations after four years of bargaining.

The SCC also noted that the Gallery effectively surprised the Associations by attending a meeting with a revised draft scale agreement, rather than exchanging draft agreements prior to the meeting, which had been the parties' practice.

Although both the Tribunal and the SCC acknowledged that the Gallery's position stemmed from the legal opinion it had received, neither suggested this excused the Gallery's reversal or strict stance on the matter.

What this means to you

This decision reinforces the importance of preparation in the collective bargaining process. If the Gallery had obtained the legal opinion in 2003, rather than 2007, and bargained on the basis of that opinion from the beginning, it likely would not

have been found to have failed to bargain in good faith.

The decision also underscores the difficulty a party will have if it tries to reverse its position on an issue late in the bargaining process.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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